

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

REPLY COMMENTS OF
The American Library Association and the Association of Research Libraries

The American Library Association (ALA) and the Association of Research Libraries (ARL)¹ respectfully submit the attached paper by Dr. Barbara Cherry, a professor in the Department of Telecommunications at the University of Indiana, into the record of this proceeding. The paper, entitled “Experimenting With Governance for U.S. Broadband Infrastructure: The Wisdom of Retaining or Dismantling Prior Legal Innovations” provides an interesting historical review of the roots of common carriage law and the principles on which it is founded.

The paper draws some interesting conclusions that we believe the FCC should consider in deciding what net neutrality rules should be adopted for broadband services. In particular, the paper finds that common carriage has proven to be a useful concept to protect consumers in the retail marketplace and has been used successfully in other industries (such as transportation). It also finds that common carriage principles evolved independently of the competitiveness of the marketplace.

The analytical problems from ignoring the common law origins of common carriage and the temporal sequencing of its relationship to antitrust law include a preoccupation with evaluating regulation governing the wholesale market and inadequate attention to regulation governing the retail market (Cherry, 2006, p. 484). This has led to assumptions or assertions that reliance on antitrust law for wholesale market problems will, as if by an invisible hand, trickle down to adequately address problems in the retail market. *However, the statutory framework of common carriage evolved because competition was insufficient even under the common law framework of common carriage to adequately address problems in the retail market.* The elimination of the centuries-old common law principles of common carriage constitutes a new experiment with which the U.S. has had no prior experience. (page 30)

¹ ALA, ARL and EDUCAUSE previously submitted initial comments in this proceeding on October 12, 2010.

In addition, Dr. Cherry suggests that asymmetrically applying common carriage to traditional voice telephone services but not to broadband services may not be sustainable and may result in no common-carriage service being available in some geographic areas (presumably rural and high-cost areas). Moreover, she raises the interesting notion that the lack of common carriage oversight over broadband may undermine the sustainability of other competitive services, such as the U.S. Postal Service. (see pages 30-31)

Finally, Dr. Cherry finds that the principles of common carriage are analogous to federalism, as both frameworks provide flexibility for changing circumstances and the introduction of new technologies:

The framework established by common law principles of common carriage is similar to that of federalism. Common carriage principles provide a framework in which the salient questions continue to be debated, that is, a framework for ongoing negotiation on a case-by-case basis as to what is unjust or unreasonable discrimination, a just and reasonable price, and an adequate level of service. The framework of ongoing negotiation enables the “justness”, “reasonableness” and “adequacy” of carrier practices, prices and services to be determined over time under varying situations, conditions and technological capabilities. Thus, as with federalism, common carriage principles provide mechanisms for both experimentation and stability that confer advantages for adaptability over time and changing circumstances. This inherent experimental character of the common carriage framework is what provides its resilience. (page 32)

We submit that this paper offers historical and intellectual support for the application of net neutrality rules across all broadband platforms, as we suggested in our initial comments in this proceeding.

Respectfully submitted,

Prudence S. Adler
Associate Executive Director
The Association of Research Libraries

Emily Sheketoff
Executive Director
The American Library Association

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